UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

In re PATRICIA OLESH, Debtor	Chapter 7 Case No.: 03-51270
NEW FALLS CORPORATION, Plaintiff, v. PATRICIA OLESH f/k/a PATRICIA BERESCIK Defendant.	A.P. No. 04-05021
Appearances: Douglas M. Evans, Esq. Kroll, McNamara and Evans 29 South Main Street West Hartford, CT 06107 Ira B. Charmoy, Esq. 1700 Post Road, Suite D-3 P.O. Box 745 Fairfield, CT 06824	 Attorney for the plaintiff Attorney for the defendant/ debtor

MEMORANDUM AND ORDER ON NONDISCHARGEABILITY

Alan H.W. Shiff, United States Bankruptcy Judge:

The plaintiff seeks a determination that a debt owed by the defendant is nondischargeable under 11 U.S.C. § 523(a)(4) & (6). The defendant concedes it owes the debt but argues that it is dischargeable.

Background

On November 30, 1999, the defendant executed a Commercial Pledge and Security Agreement (the "Pledge") with Matsco Financial Corporation ("Matsco"), a predecessor-in-interest to the plaintiff. Under the Pledge, the defendant guaranteed a $650,000 loan from Matsco to her husband, Alvin B. Olesh, by granting Mastco a security interest in a brokerage accountant holding Van Kampen mutual fund shares totaling approximately $200,000 (the "Shares"). The Pledge provided that the defendant would not transfer her interest in the account except as provided therein, and that the Shares would not be transferred from the brokerage account, unless replaced by shares of an equal value, until her husband's debt was paid in full. The defendant also executed a second agreement captioned Control Agreement and Acknowledgment of Pledge and Security Interest (the "Acknowledgment"), which informed her account broker, Dupont Securities Group, Inc., that Matsco had been granted a security interest. The defendant did not receive any money or direct benefit from Matsco as a result of the loan.

The plaintiff alleged that after the execution of the Pledge and the Acknowledgment (collectively, the "Agreements"), the defendant hired another broker, Lantern Investments, Inc., which was unaware of the Agreements, and through that broker, she transferred the Shares to her father-in-law prior to her bankruptcy. The plaintiff argues that as a consequence of the transfer of the Shares, the debt should be deemed nondischargeable under §§ 523(a)(4) & (a)(6). The defendant does not deny that she executed the Agreements and caused the Shares to be transferred, but nonetheless argues that she did not willfully take or injure property as defined by those sections. The basis for that claim is that although the accounts may have been in her name, she only executed the Agreements and caused the Shares to be transferred at the direction of her abusive husband, who repeatedly threatened to harm her if she did not obey him. *See, e.g.,* Tr. at 40-41, 51, 67; *see also* Tr. at 62-66 (testifying that she also witnessed her husband abusing their daughter).

Discussion

I

It is well established that exceptions to discharge should be narrowly "'confined to those plainly expressed.'" *Kawaauhau v. Geiger,* 523 U.S. 57 (1998) (*quoting Gleason v.* Thaw, 236 U.S. 558, 562 (1915)). Section 523(a) provides in relevant part:

> A discharge . . . does not discharge an individual defendant from any debt--
>
> (4) for . . . larceny; [or]
>
> (6) for willful and malicious injury by the defendant to another entity or to the property of another entity.

As to subsection (a)(4), this court has held that "[u]nder federal common law, '[l]arceny is proven, for nondischargeability purposes, by a showing that the defendant has willfully taken property with fraudulent intent.'" *In re Roberti*, 183 B.R. 991, 1009-10 (Bankr. D. Conn. 1995) (quoting *In re Kelly,* 155 B.R. 75, 78 (Bankr. S.D.N.Y. 1993)). Larceny is alternatively defined as the felonious taking of another's personal property with the intent to convert it or deprive its owner of the same. *Id.*

It is also well established that "a determination of non-dischargeability under subsection (a)(6) requires proof that there was a willful and malicious injury, that is, 'a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury . . . .'" *In re Amaranto*, 252 B.R. 595, 599 (Bankr. D. Conn. 2000) (*quoting Kawaauhau,* 523 U.S. at 61). The Second Circuit Court of Appeals has defined willful as "deliberate or intentional" and malicious as "wrongful and without just cause or excuse, even in the absence of personal hatred, spite, or ill-will." *In re Stelluti,* 94 F.3d 84, 87 (2d Cir. 1996). The plaintiff has the burden of proof by a fair preponderance of the evidence under both subsection (4) and (6). *See* 11 U.S.C. § 523(c)(1); *see also Grogan v. Garner*, 498 U.S. 279 (1991) (holding that the standard of proof for all § 523 dischargeability exemptions is a preponderance of the evidence.).

II

The plaintiff introduced brokerage statements, which the defendant did not dispute, which demonstrated that even though the defendant granted the plaintiff's predecessor a security interest in the brokerage account and promised not to transfer the Shares, the Shares were nonetheless transferred. *See* Exs. A-G, J-P. Arguably, that evidence established a *prima facie* case that the defendant intentionally willfully took or injured the plaintiff's property. *Cf., e.g., Radin v. United States*, 189 F. 568, 570 (2d Cir. 1911) ("The law presumes that every sane person intends the necessary consequences of [her] acts."). Even if that is so, the defendant's testimony, as the only witness in this proceeding, persuasively rebutted any such *prima facie* case. Having observed the defendant and heard her testify, the court concludes that she credibly testified that although she could not remember a specific threat, she was in *constant* fear of her husband. The court was convinced by her testimony that she had a genuine fear that if she did not sign papers that were put before her and cause the Shares to be transferred from her brokerage account, she would be verbally and physically harmed as she had been throughout her marriage. *See, e.g.,* Tr. at 40-41, 51-57, 62-67. That testimony was collaborated by restraining orders the Connecticut Superior Court issued against her husband for her protection. *See* Exs. 2-6.

The plaintiff did not question the defendant's credibility. *See* Tr. at 46 ("Your honor, I haven't challenged the witness as having fabricated a story."). Accordingly, the undisputed evidence before the court is that the defendant acted in fear of her husband when she executed the Agreements and caused the transfer of the Shares.

III

The thrust of the plaintiff's argument is that even though the defendant may have had a general fear of abuse from her husband if she did not obey his demands, if she could not recall a specific threat at the time she executed the Agreements or the caused the Shares to be transferred, she would have not rebutted the presumption that she intended the natural consequences of her acts. That argument is a *non sequitur*. A specific recollection of a threat at the precise moment an action is taken is not necessary if a

defendant credibly demonstrates the constant existence of such a threat. After observing the defendant testify and having had the opportunity to assess her credibility, the court is satisfied that she believed that she had no choice but to execute the Agreements and cause the Shares to be transferred.

For the foregoing reasons, it is determined that the debt arising out of the Agreements is not excepted under 11 U.S.C. §§ 523(a)(4) and (6), and

IT IS SO ORDERED.

Dated at Bridgeport, Connecticut, this 19th day of August, 2005.

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Alan H.W. Shiff
United States Bankruptcy Judge